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# Lender Liability Under CERCLA Deserves More Than a Fleeting Glance

G. Alan Perkins

# COMMENT

## LENDER LIABILITY UNDER CERCLA DESERVES MORE THAN A *FLEET*ING GLANCE*




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## I. INTRODUCTION

The federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980[1] (CERCLA or Superfund Act) imposes very broad liability on certain parties for the cleanup of sites with existing or threatened hazardous waste contamination. Although CERCLA contains a so-called "secured creditor exemption,"[2] several courts have concluded that secured creditors may be held liable for cleaning up contaminated sites owned or operated by their borrowers.[3]

The financial community's apprehension over interpretation of the secured creditor exemption intensified in the wake of *United States v. Fleet Factors Corp.*,[4] a highly controversial decision from the United States Court of Appeals for the Eleventh Circuit. *Fleet Factors*[5] is the first appellate decision interpreting the scope of the secured creditor exemption. In *Fleet Factors* a lender foreclosed on its security interest in the debtor's inventory and equipment and took steps to liquidate the collateral.[6] It did not foreclose on the real property, a cloth printing facility.[7] The United States alleged that during the sale and removal of equipment from the debtor's plant, toxic chemicals and asbestos were

1. Pub. L. No. 96-510, 94 Stat. 2767 (1980) (hereinafter CERCLA) (codified in part as amended at 42 U.S.C. §§ 9601-9675 (1988)) (Sections of the Superfund Act will be cited in footnotes as CERCLA, followed by the citation to U.S.C.).

2. CERCLA, 42 U.S.C. § 9601(20)(A).

3. See *infra* notes 134-214 and accompanying text.

4. 901 F.2d 1550 (11th Cir. 1990).

5. *Id.*

6. *Id.* at 1552. For a more detailed discussion of *Fleet Factors*, see *infra* notes 180-96 and accompanying text.

7. *Id.*

released.[8] The Eleventh Circuit narrowly construed the secured creditor exemption and held that the facts were sufficient to make out a case of liability against Fleet Factors Corporation.[9] In affirming the denial of Fleet's motion for summary judgment, the court announced the following standard of liability: "[A] secured creditor may incur . . . [Superfund] liability, without being an operator, *by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes.*"[10] The expressed intent of the court's holding in *Fleet Factors* is to commission lenders as environmental police.[11]

As a result of *Fleet Factors* and its forerunners, an impassioned controversy is raging over whether, and under what conditions, a secured lender should be held liable for the cleanup of contaminated collateral. Under CERCLA's liability scheme, an "owner or operator"[12] of a hazardous site is strictly liable[13] for its cleanup. But, the secured creditor exemption excludes from the scope of "owner or operator" any "person, who without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility."[14]

Because CERCLA was virtually silent[15] on the meaning of the secured creditor exemption, lenders have little guidance on what activities might subject them to liability. Indeed, when CERCLA was in its infancy, secured creditors gave little thought to its ramifications for the lending industry.[16] But, as courts broadly interpreted CERCLA's liability provisions, it became clear that the secured creditor exemption would not be a safe harbor for lenders.[17] As the spectre of immense

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8. *Id.* at 1553.

9. *Id.* at 1557.

10. *Id.* (citations omitted, emphasis added).

11. *Id.* at 1558.

12. CERCLA, 42 U.S.C. §§ 9601(20)(A).

13. CERCLA, 42 U.S.C. § 9607(a)(1)-(2).

14. CERCLA, 42 U.S.C. § 9601(20)(A).

15. CERCLA was hastily drafted, near the end of the 96th Congress, in a "cut-and-paste" fashion, with no conference report on the statute as enacted. As one court noted about the Superfund Act: "It was hastily, and, therefore, inadequately drafted. Even the legislative history must be read with caution since last minute changes in the bill were inserted with little or no explanation." United States v. Price, 577 F. Supp. 1103, 1109 (D.N.J. 1983).

16. Burcat, *Environmental Liability of Creditors: Open Season on Banks, Creditors, and Other Deep Pockets*, 103 BANKING L.J. 509 (1986).

17. *E.g.*, United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994 (E.D. Pa. 1985); United States v. Maryland Bank & Trust Co., 632 F. Supp. 573 (D. Md. 1986).

liability for borrowers' environmental damage grew, many lenders began to consider environmental liability for the first time in the loan approval process.[18]

In response to lenders' concerns, several legislative proposals were introduced in the 101st Congress which would limit CERCLA liability of lenders and related governmental entities.[19] In addition to the private lending industry, the Resolution Trust Corporation (RTC),[20] Federal Deposit Insurance Corporation (FDIC),[21] and Small Business Administration (SBA) strongly endorse a legislative move to protect lenders.[22] The federal Environmental Protection Agency (EPA), on the other hand, is advocating an "administrative fix" to the situation.[23] An unusual alliance of environmental groups and chemical industry representatives favor the EPA proposal and strongly oppose legislation to alter the CERCLA liability scheme.[24]

The Superfund Act created a complex and controversial program to address the massive problem of cleaning up the nation's inactive and abandoned hazardous waste disposal sites. In general, CERCLA's primary features are (1) authorization for the federal government to respond to hazardous substance releases,[25] (2) creation of the Hazardous Substance Response Trust Fund or "Superfund," a $1.6 billion revolv-

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18. Burcat, *supra* note 16.

19. H.R. 4494, 101st Cong., 2d Sess. (1990) (To amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 to limit the liability under that Act of lending institutions acquiring facilities through foreclosure or similar means and corporate fiduciaries administering estates or trusts); H.R. 4076, 101st Cong., 2d Sess. (1990) (To amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 to exempt a Federal department, agency, or instrumentality from liability under that Act when a facility is conveyed to the department, agency, or instrumentality due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means); S. 2827, 101st Cong., 2d Sess. (1990) (To improve the administration of the Federal Deposit Insurance Corporation and to make technical amendments to the Federal Deposit Insurance Act).

20. *Hearing on Lender Liability Under Superfund, H.R. 4494, Before the Subcomm. on Transp. and Hazardous Materials of the Comm. on Energy and Commerce*, 101st Cong., 2d Sess. (1990) (statement of David C. Cooke, Resolution Trust Corporation) (hereinafter Lender Liability Hearing).

21. Lender Liability Hearing, *supra* note 20 (statement of Steven A. Selig, Director, Division of Liquidation, FDIC).

22. IV Superfund Rep. (Inside EPA) No. 17, at 3-5 (Aug. 15, 1990); *id.* No. 16, at 4-5 (Aug. 1, 1990); 21 Env't Rep. (BNA) 533-34 (July 27, 1990); *id.* at 344 (June 15, 1990).

23. Lender Liability Hearing, *supra* note 11 (statement of James Strock, Assistant Admin. for Enforcement, EPA); IV Superfund Rep. (Inside EPA) No. 18, at 9 (Aug. 29, 1990); *id.* No. 17, at 3-5 (Aug. 15, 1990).

24. See reports cited *supra* note 22.

25. CERCLA, 42 U.S.C. §§ 9604-9606.

ing fund to pay for emergency responses,[26] (3) creation of an Agency for Toxic Substances and Disease Registry,[27] and (4) imposition of liability for cleanup costs on broadly defined classes of "potentially responsible parties."[28] CERCLA was overhauled in 1986, including an $8.5 billion replenishment of the Superfund, by the Superfund Amendments and Reauthorization Act of 1986 (SARA).[29]

Not surprisingly, the most controversial provisions of the Superfund Act are those which impose liability on private parties for the costs of hazardous waste cleanup. CERCLA imposes liability on four broad classes of parties associated with hazardous waste disposal facilities—past and present owners and operators,[30] generators,[31] and transporters.[32] These liability-imposing provisions have spawned considerable litigation.[33]

Early cost recovery actions under CERCLA concentrated on the liability of hazardous waste generators[34] and the standard of liability to

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26. CERCLA, 42 U.S.C. § 9631.

27. CERCLA, 42 U.S.C. § 9604(i).

28. CERCLA, 42 U.S.C. § 9607.

29. Pub. L. No. 99-499, 100 Stat. 1613 (1986) (hereinafter SARA) (codified in part at 42 U.S.C. §§ 9601-9675 (1988)).

30. CERCLA, 42 U.S.C. § 9607(a)(1)-(2).

31. CERCLA, 42 U.S.C. § 9607(a)(3).

32. CERCLA, 42 U.S.C. § 9607(a)(4).

33. As of November 1986, 115 CERCLA cases, several of which were cost recovery actions, were pending in the courts. 17 Env't Rep. (BNA) 1261 (Nov. 28, 1986) (quoting F. Henry Habicht, Assistant Attorney General for the Land and Natural Resources Division, United States Justice Department). A WESTLAW search on Sept. 20, 1990, located 125 federal district court decisions in separate cases regarding cost recovery under CERCLA. Search terms: title ("United States") & CERCLA & ((107) (42 +5 9607)). In the search, multiple decisions in the same proceeding were counted as one, and decisions on other aspects of CERCLA were not included.

Superfund cost recovery litigation continues to proliferate. During the first three quarters of fiscal 1990, EPA made 82 civil judicial referrals to the United States Department of Justice (DOJ) for Superfund cost recovery. This figure is up from 74 in fiscal 1989 and 48 in fiscal 1988 for the same period. Telephone interview with William H. Frank, Special Assistant to the Assistant Administrator for Enforcement, EPA, Washington, D.C. (Sept. 21, 1990). Superfund cases represented a high proportion of all EPA civil judicial referrals to DOJ during the last three years (the following statistics are for the first three quarters of the years shown): 82/191 in 1990, 74/183 in 1989, and 48/216 in 1988. *Id.*

34. *E.g.*, United States v. Price, 577 F. Supp. 1103 (D.N.J. 1983) (A past nonnegligent offsite generator may be held strictly liable for hazardous waste cleanup under CERCLA); *see* Comment, *CERCLA Litigation Update: The Emerging Law of Generator Liability*, 14 Envtl. L. Rep. (Envtl. L. Inst.) 10,224 (June 1984); Comment, *The Liability of Financial Institutions for Hazardous Waste Cleanup Costs Under CERCLA*, 1988 WIS. L. REV. 139, 144 & n.21 (hereinafter Comment, *Liability of Financial Institutions*); Note, *When a Security Becomes a Liability: Claims Against Lenders in Hazardous Waste Cleanup*, 38 HASTINGS L.J. 1261, 1266 (1987).

be imposed.[35] While these early decisions presented the courts with some difficulties, primarily in interpreting ambiguous statutory provisions of CERCLA, there was no conceptual dilemma in imposing liability on parties which had generated hazardous waste. This theme was voiced by Judge Newcomer in one of the first decisions on CERCLA liability: "What is clear, however, is that the Act is intended to facilitate the prompt cleanup of hazardous waste dump sites and when possible to place the ultimate financial burden upon those responsible for the danger created by such sites."[36]

However, armed with the "overwhelmingly remedial"[37] goal of CERCLA, the courts have expansively interpreted the scope of liability for Superfund cleanups. In doing so, courts more recently have focused on the meaning of "owner or operator" for determining liability under CERCLA section 107(a).[38] As courts impose CERCLA liability on parties whose relationships with actual waste disposal activities are more attenuated,[39] the "polluter pays" principle[40] is a less appealing justification for their decisions.

The purpose of this Comment is to analyze the current status and

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35. See *infra* notes 94-115 and accompanying text.

36. United States v. Wade, 577 F. Supp. 1326, 1331 (E.D. Pa. 1983) (Wade II). "An essential purpose of CERCLA is to place the ultimate responsibility for the clean-up of hazardous waste on 'those responsible for problems caused by the disposal of chemical poison.' " Florida Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1317 (11th Cir. 1990) (quoting United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1377 (8th Cir. 1989), and Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986)).

37. United States v. Fleet Factors Corp., 901 F.2d 1550, 1557 (11th Cir. 1990); *Florida Power & Light Co.*, 893 F.2d at 1317; United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 733 (8th Cir. 1986) (hereinafter *NEPACCO*); United States v. New Castle County, 727 F. Supp. 854, 859 (D. Del. 1989).

38. CERCLA, 42 U.S.C. § 9601(20)(a) (definition of "owner or operator"); CERCLA, 42 U.S.C. § 9607(a)(1)-(2) (imposing liability on owners and operators); *see* Comment, *CERCLA 1985: A Litigation Update*, 15 Envtl. L. Rep. (Envtl. L. Inst.) 10,395 (Dec. 1985); Comment, *Liability of Financial Institutions*, *supra* note 34, at 144; Note, *supra* note 34.

39. Examples of "remote" parties found liable for Superfund cleanups are: non-foreclosing lenders, *Fleet Factors*, 901 F.2d 1550; residential real estate developers, Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568 (5th Cir. 1988); officers-stockholders, New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985); parent corporation, United States v. Nicolet, Inc., 712 F. Supp. 1193 (E.D. Pa. 1989); foreclosing lenders, United States v. Maryland Bank & Trust Co., 632 F. Supp. 573 (D. Md. 1986); nonnegligent past offsite generators, United States v. Price, 577 F. Supp. 1103 (D.N.J. 1983).

40. The term "polluter pays" principle is a shorthand description of the broad policy underlying CERCLA's liability provisions. *See* Atkeson, Goldberg, Ellrod & Connors, *An Annotated Legislative History of the Superfund Amendments and Reauthorization Act of 1986 (SARA)*, 16 Envtl. L. Rep. (Envt. L. Inst.) 10,360, 10,369 n.89 (Dec. 1986) (hereinafter Atkeson, *Annotated SARA History*); *see also supra* note 36 and accompanying text.

future trends of lender liability for hazardous waste cleanup costs under CERCLA. Because the Superfund Act was unenlightening as to the meaning of the secured creditor exemption, the analysis begins with a brief discussion of federal environmental regulation and an overview of CERCLA. This background is helpful for analyzing the lender liability controversy in light of the policy considerations which guided Congress in Superfund's passage. Next, the Comment discusses judicial interpretations of lender liability and the secured creditor exemption. Finally, industry reaction to those decisions, particularly *Fleet Factors*, is examined, and proposals for change are reviewed.

## II. MODERN FEDERAL ENVIRONMENTAL REGULATION

> An ethic, ecologically, is a limitation on freedom of action in the struggle for existence. An ethic, philosophically, is a differentiation of social from anti-social conduct. These are two definitions of one thing.
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> There is yet no ethic dealing with man's relation to land and to the animals and plants which grow upon it. Land, like Odysseus' slave-girls, is still property. The land-relation is still strictly economic, entailing privileges but not obligations.
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> The extension of ethics to this . . . element in human environment is, if I read the evidence correctly, an evolutionary possibility and an ecological necessity. . . . Individual thinkers since the days of Ezekiel and Isaiah have asserted that the despoliation of land is not only inexpedient but wrong. Society, however, has not yet affirmed their belief. I regard the present conservation movement as the embryo of such an affirmation.[41]

This prophetic statement by Aldo Leopold was first published in 1949, about twenty years before "Earth Day," considered by many to have signaled the beginning of the environmental decade of the 1970s.[42] During 1970, a groundswell of public concern for the environ-

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41. A. LEOPOLD, *The Land Ethic*, in A SAND COUNTY ALMANAC WITH ESSAYS ON CONSERVATION FROM ROUND RIVER 238-39 (1970).

42. On April 22, 1970, the nation witnessed a remarkable outpouring of widespread, public concern: several million Americans in communities all across the country took part in an event called Earth Day. On that day environmental education programs were presented at thousands of grade schools; the National Education Association estimated that 10 million school children participated. Teach-ins were held at several thousand high schools and colleges, and hundreds of thousands of students collected litter from parks, city streets, and suburban neighborhoods. Mass demonstrations were held in cities like Philadelphia, Chicago, New York, and Washington, D.C. Automobile traffic

ment surfaced—and politicians responded. In that year, President Nixon established the first Council on Environmental Quality, the National Oceanic and Atmospheric Administration, and the Environmental Protection Agency.[43] These new enforcers of the environment were termed Nixon's "policemen for pollution."[44]

Congress ushered in the environmental era with the National Environmental Policy Act of 1969 (NEPA).[45] NEPA set the philosophical tone for federal environmental laws by stating lofty societal goals[46] and requiring governmental agencies to protect environmental quality in all aspects of their programs.[47] Later in 1970, Congress set the regulatory tone for federal environmental laws by passing the Clean Air Act (CAA),[48] considered by some to be the "most complex, expensive, and pervasive of the federal regulatory environmental statutes."[49] Despite the CAA's burdensome requirements, its enactment was supported by a "breathtaking unanimity of national purpose."[50]

During the 1970s, Congress totally revamped the Federal Water Pollution Control Act (FWPCA or Clean Water Act),[51] enacted the

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was banned from a part of downtown Manhattan, and Congress adjourned to allow members to speak at environmental rallies across the country. As the Washington Post reported, on Earth Day millions of Americans 'demonstrated . . . their practical concern for a liveable environment on this earth.'

COUNCIL ON ENVIRONMENTAL QUALITY, TWENTIETH ANNUAL REPORT 2 (1989); *see also* COUNCIL ON ENVIRONMENTAL QUALITY, TENTH ANNUAL REPORT 1-15 (1979); F. ANDERSON, D. MANDELKER, & A. TARLOCK, ENVIRONMENTAL PROTECTION: LAW AND POLICY 3-13 (1984).

43. COUNCIL ON ENVIRONMENTAL QUALITY (1989), *supra* note 42, at 149.

44. *Id.*

45. Pub. L. No. 91-190, 83 Stat. 852 (1970) (hereinafter NEPA) (codified as amended at 42 U.S.C. §§ 4321-4370 (1988)). Congress actually passed NEPA in late 1969. NEPA was signed into law on January 1, 1970.

46. NEPA's stated purpose was:

> To declare a national policy which will encourage productive enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

NEPA, 42 U.S.C. § 4321.

47. NEPA, 42 U.S.C. § 4332.

48. Pub. L. No. 91-604, 84 Stat. 1676 (1970) (hereinafter CAA) (codified as amended at 42 U.S.C. §§ 7401-7642 (1988)).

49. F. ANDERSON, D. MANDELKER, & A. TARLOCK, *supra* note 42, at 118.

50. *Id.* at 132. Congress passed the Clean Air Act by votes of 73-0 in the Senate and 374-1 in the House of Representatives. *Id.*

51. Pub. L. No. 92-500, 86 Stat. 816 (1972) (hereinafter FWPCA or Clean Water Act) (codified as amended at 33 U.S.C. §§ 1251-1387 (1988)). FWPCA's 1972 amendments set forth supernal goals for the nation's waters: (1) eliminate the discharge of pollutants into navigable

Resource Conservation and Recovery Act (RCRA),[52] and passed many other environmental regulatory statutes.[53] Federal pollution laws enacted prior to CERCLA generally have several characteristics in common: (1) they are almost exclusively prospective in application; (2) they have a paternal quality, guiding industry's conduct to reduce pollution at its source (control rather than cleanup); (3) the regulated community is directly connected with the source of pollutants being controlled; and (4) the cost of a cleaner environment is placed on industries whose activities pollute the resource (and ultimately on consumers).[54]

Two federal statutory provisions prior to CERCLA did impose liability on certain parties for pollution cleanup. The first is section 311 of the Clean Water Act.[55] The second is RCRA's "imminent hazard" provision.[56]

### A. Section 311 of the Clean Water Act

Section 311 of the Clean Water Act[57] established "owner and operator" liability for discharges of oil or hazardous substances into navigable waters of the United States. Owners and operators[58] of vessels or facilities which discharge oil or a hazardous substance are strictly liable for cleanup costs[59] and subject to civil penalties.[60] Congress explicitly incorporated the standard of strict liability imposed by section 311

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waters by 1985; and (2) wherever attainable, waters should be fishable and swimmable by mid-1983. These lofty declarations echoed the pervasive public sentiment favoring environmental values. While the goals are unenforceable per se, courts have used these goals to justify broad construction of FWPCA's provisions. *E.g.*, Reynolds Metals Co. v. United States EPA, 760 F.2d 549 (1985).

52. Pub. L. No. 94-580, 90 Stat. 2795 (1976) (hereinafter RCRA) (codified as amended at 42 U.S.C. §§ 6901-6992k (1988)).

53. See COUNCIL ON ENVIRONMENTAL QUALITY (1989), *supra* note 42, at 150-53 for a list of federal environmental regulatory statutes.

54. *See e.g.*, CAA, 42 U.S.C. §§ 7409-7412; CWA, 42 U.S.C. § 1311; *see also* Cahan, *Business Transactions: A Guide Through the Wilderness*, NAT. RESOURCES & ENV'T, Summer 1990, at 25-26.

55. FWPCA, 33 U.S.C. § 1321.

56. RCRA, 42 U.S.C. § 6973(a).

57. FWPCA, 33 U.S.C. § 1321.

58. FWPCA, 33 U.S.C. § 1321(a)(6) (definition of "owner or operator").

59. FWPCA, 33 U.S.C. § 1321(f); *e.g.*, United States v. West of Eng. Ship Owner's Mut. Protection & Indem. Ass'n, 872 F.2d 1192 (5th Cir. 1989).

60. FWPCA, 33 U.S.C. § 1321(b)(6); *e.g.*, United States v. New York, 481 F. Supp. 4 (S.D.N.Y. 1979), *aff'd without opinion*, 614 F.2d 1292 (2d Cir.), *cert. denied*, 446 U.S. 936.

of the FWPCA into CERCLA's liability scheme.[61]

However, unlike CERCLA, liability under section 311 of the Clean Water Act has only prospective application. The Clean Water Act does not cover discharges which occurred prior to passage of section 311.[62] Furthermore, although liability under section 311 is strict (i.e., without fault), interpreting courts generally require a showing of proximate cause on the part of the owner or operator before liability attaches.[63]

## B. Resource Conservation and Recovery Act

The Resource Conservation and Recovery Act of 1976 (RCRA) provides a "prospective cradle-to-grave regulatory regime governing the movement of hazardous waste in our society."[64] RCRA completed the trilogy of federal statutes controlling the prospective introduction of pollutants into the environment—air, water, and land. Like the Clean Air Act and Clean Water Act, RCRA created a complex, comprehensive, and direct regulatory program.[65] RCRA's regulatory provisions focus on safe treatment, storage, and disposal of hazardous wastes.[66]

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61. CERCLA, 42 U.S.C. § 9601(32) states: "The term 'liable' or 'liability' under this subchapter shall be construed to be the standard of liability which obtains under section 1321 of Title 33."

62. FWPCA, 33 U.S.C. § 1321(b)(3) states: "The discharge of oil or hazardous substances . . . in such quantities as may be harmful . . . is prohibited." Liability for removal costs attaches only when "oil or a hazardous substance is discharged *in violation of subsection b(3).*" *Id.*, § 1321(f)(1) (emphasis added).

63. "Given its statutory language and legislative history, it is clear that section 1321(f)(1) is causation-based and not fault-based." *West of Eng. Ship Owner's*, 872 F.2d at 1197. *See* United States v. Tex-Tow, Inc., 589 F.2d 1310 (7th Cir. 1978) (holding that an oil discharge must be sufficiently foreseeable to result in liability under section 311).

64. INTERSTATE AND FOREIGN COMMERCE COMM., H.R. REP. NO. 1016, pt. 1, 96th Cong., 2d Sess. 17, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6120 (hereinafter *CERCLA History*; page references are to U.S. Code Cong. & Admin. News).

65. Generally, the RCRA's objectives include: (1) technical and financial assistance for developing solid waste management plans; (2) training grants for solid waste disposal occupations; (3) prohibition of open dumping; (4) promulgation and enforcement of standards for proper solid and hazardous waste management practices; (5) promotion of research, development, demonstration, and construction of improved waste management systems and resource conservation systems; and (6) establishment of a federal-state "partnership" to further the purposes of the Act. RCRA, 42 U.S.C. § 6902(a).

66. Waste generators must comply with strict requirements for recordkeeping, reporting, labeling, container use, and information exchange. RCRA, 42 U.S.C. § 6922. RCRA also created a manifest system for complete tracking of hazardous waste shipments. RCRA, 42 U.S.C. § 6923. And, treatment, storage, and disposal facilities must comply with performance standards through a certification and permit program. RCRA, 42 U.S.C. §§ 6924-6925.

RCRA also authorizes EPA to force responsible parties[67] to clean up a site contaminated by improper hazardous waste handling if the waste poses "an imminent and substantial endangerment to health or the environment."[68] Under RCRA, a party must have "contributed to" the activities which caused the contamination to be liable for cleanup costs.[69] The statute also authorizes EPA to impose financial responsibility requirements on owners and operators to ensure their ability to pay cleanup costs and compensate for injuries.[70]

## III. Overview of CERCLA

### A. Policy Underlying CERCLA—Legislative History

Congress enacted CERCLA to address the immense problem of environmental contamination caused by the nation's inactive and abandoned hazardous waste sites.[71] Congress hotly debated the extent of the problem. Proponents of the bill cited a 1979 EPA study which estimated 30,000 to 50,000 inactive and uncontrolled hazardous waste sites, of which 1,200 to 2,000 likely presented serious public health risks.[72] Based on the investigation of a few problem sites, a House subcommittee concluded that four characteristics were common: "(1) The sites contain large quantities of hazardous waste . . . . (2) Unsafe design and disposal methods are widespread . . . . (3) The danger to the environment is substantial . . . . (4) Many sites pose major health hazards."[73] The investigation included such notorious sites as Love Canal and the Valley of the Drums.[74]

The bill's opponents blasted the EPA study as "little better than pure guesswork," and offered contradictory studies with estimates as low as 431 potentially hazardous sites.[75] Later studies, however, have

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67. Responsible parties include "any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility." RCRA, 42 U.S.C. § 6973(a).

68. *Id.*

69. *Id.* This causation element is absent from CERCLA's liability scheme. See *infra* notes 112-15 and accompanying text.

70. In response, EPA imposed mandatory insurance requirements. 40 C.F.R. § 264.140 to .151 (1989).

71. *CERCLA History*, *supra* note 64, at 6119.

72. *Id.* at 6120.

73. *Id.* at 6121-22.

74. *Id.*

75. *Id.* at 6147 (Dissenting views of Representatives Stockman and Loeffler). In their dissent, Stockman and Loeffler argued that "there has never existed, especially in recent times, a

largely borne out EPA's estimates. By 1989, EPA had inventoried about 27,000 hazardous waste sites and placed 1,077 on the National Priorities List.[76]

Congress recognized that RCRA was inadequate to deal with the problem of inactive and abandoned sites. CERCLA was explicitly designed to fill RCRA's "important regulatory gaps."[77] One shortcoming of RCRA's cleanup provision is that it only applies to sites that pose an "imminent" hazard.[78] Even then, RCRA provides no solution "if a financially responsible owner of the site cannot be located."[79] Congress also was dissatisfied with RCRA's inadequate funding and EPA's slow enforcement progress.[80]

After intense and protracted debate, CERCLA was enacted near the end of the 96th Congress under a suspension of the rules prohibiting amendments.[81] Because of last minute changes and compromises, the cut-and-paste bill which emerged had little recorded legislative history and no full committee report.[82] Courts[83] and commentators[84] agree

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regulatory or legal vacuum that permitted widespread gross irresponsibility and negligence in disposal and storage, nor are we consequently faced today with a national landscape thickly littered with industrial time bombs." *Id.* at 6146-47.

76. COUNCIL ON ENVIRONMENTAL QUALITY, TWENTIETH ANNUAL REPORT 162-63 (1989).

77. *CERCLA History*, *supra* note 64, at 6125.

78. *Id.*

79. *Id.*

80. *Id.* at 6124-25.

81. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1980); Comment, *Liability of Financial Institutions*, *supra* note 34, at 145-46.

82. Grad, *supra* note 81.

83. "CERCLA is in fact a hastily drawn piece of compromise legislation, marred by vague terminology and deleted provisions. . . . The courts are once again placed in the undesirable and onerous position of construing inadequately drawn legislation." United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 838-39 n.15 (W.D. Mo. 1984), *aff'd in part, rev'd in part and remanded*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987) (hereinafter *NEPACCO*). "Because of the haste with which CERCLA was enacted, Congress was not able to provide a clarifying committee report, thereby making it extremely difficult to pinpoint the intended scope of the legislation." United States v. Price, 577 F. Supp. 1103, 1109 (D.N.J. 1983). "Any attempt to divine the legislative intent behind many of [CERCLA's] provisions will inevitably involve a resort to the Act's legislative history. Unfortunately, the legislative history is unusually riddled by self-serving and contradictory statements." United States v. Wade, 577 F. Supp. 1326, 1331 (E.D. Pa. 1983) (*Wade II*). "Due to the legislative history of the act, the Committee Reports must be read with some caution." United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1111 (D. Minn. 1982).

84. Grad, *supra* note 81; Eckhardt, *The Unfinished Business of Hazardous Waste Control*, 33 BAYLOR L. REV. 253 (1981); Comment, *Liability of Financial Institutions*, *supra* note 34; Note, *supra* note 34.

that CERCLA's hasty passage resulted in vague provisions and a history which provides little help in determining Congress' intent.

Nevertheless, three basic premises of CERCLA's statutory scheme seem clear. First, inactive and abandoned hazardous waste sites pose a serious problem of national magnitude.[85] Second, the federal government must have the necessary tools to effectively respond to the problem.[86] And third, *polluters should pay* for cleaning up hazardous sites whenever possible.[87]

## B. Liability Under CERCLA—Potentially Responsible Parties

CERCLA imposes liability for costs of hazardous waste cleanup on four broad classes of potentially responsible parties (PRPs). First, the current owner or operator of a vessel or facility from which there is a release or threatened release of a hazardous substance may be held liable regardless of when the release occurred.[88] Second, CERCLA imposes liability on persons who owned or operated a facility in the past, during which time a hazardous substance was disposed of at the site.[89] Third, generators of hazardous substances who arranged for the transportation, treatment, or disposal of hazardous substances at another party's facility may be liable for response costs at that facility.[90] Last, CERCLA places liability on persons who transport hazardous substances to treatment or disposal facilities for releases at such facilities.[91] These classes of PRPs are generally referred to as current owners and operators, past owners and operators, generators, and transporters, respectively.

Liability imposed on PRPs is subject only to very narrow defenses. To avoid liability, a PRP must establish that contamination was caused *solely* by an act of God, an act of war, or an act or omission of a third

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85. See *supra* notes 71-76 and accompanying text.

86. *E.g.*, *Wade II*, 577 F. Supp. 1326, 1331; *Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112.

87. "An essential purpose of CERCLA is to place the ultimate responsibility for the clean-up of hazardous waste on 'those responsible for problems caused by the disposal of chemical poison.' " *Florida Power & Light Co.*, 893 F.2d at 1317 (quoting United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1377 (8th Cir. 1989), and Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986)); *accord Wade II*, 577 F. Supp. 1326, 1331; *Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112.

88. CERCLA, 42 U.S.C. § 9607(a)(1).

89. CERCLA, 42 U.S.C. § 9607(a)(2).

90. CERCLA, 42 U.S.C. § 9607(a)(3).

91. CERCLA, 42 U.S.C. § 9607(a)(4).

party other than an employee of the PRP or anyone with which the PRP has a contractual relationship (the "innocent landowner" or "third party" defense).[92] To successfully assert the innocent landowner defense, a PRP also must establish that he exercised due care and took precautions to prevent foreseeable misconduct of a third party.[93]

## C. Standard of Liability

### 1. *Strict Liability*

Liability under CERCLA is strict liability. Although strict liability language was deleted from the final version of CERCLA, other factors strongly indicate congressional intent that strict liability applies to PRPs.[94] The most persuasive is Congress' explicit incorporation of the standard of liability imposed by section 311 of the FWPCA.[95] CERCLA section 101(32) states: "The term 'liable' or 'liability' under this subchapter shall be construed to be the standard of liability which obtains under section 1321 of Title 33."[96] Prior to CERCLA, courts frequently held liability under the FWPCA to be strict.[97] For these reasons, courts interpreting CERCLA have consistently applied strict liability.[98] Moreover, SARA's legislative history indicates that Congress approves the application of strict liability under CERCLA: "As under . . . [the FWPCA], liability under CERCLA is strict, that is, without regard to fault or willfulness."[99]

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92. CERCLA, 42 U.S.C. § 9607(b).

93. CERCLA, 42 U.S.C. § 9607(b)(3); *see generally* ENVIRONMENTAL DUE DILIGENCE: THE COMPLETE RESOURCE GUIDE FOR REAL ESTATE LENDERS, BUYERS, SELLERS, AND ATTORNEYS (J. O'Brien & W. Frank, eds. 1989) (a detailed practical guide for conducting environmental due diligence to meet various statutory needs).

94. In United States v. Price, the court stated:

> We note that although the term "strict" was deleted at the last minute; it still appears that Congress intended to impose a strict liability standard subject only to the affirmative defenses listed in § 107(b). This conclusion is reinforced by virtue of the fact that Congress left the "due care" defense in the statute, a defense which would be rendered meaningless in the absence of strict liability.

577 F. Supp. 1103, 1113-14 (D.N.J. 1983) (citations omitted).

95. FWPCA, 33 U.S.C. § 1321.

96. CERCLA, 42 U.S.C. § 9601(32).

97. *NEPACCO*, 579 F. Supp. at 844 (citing several decisions under FWPCA).

98. United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988); Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568 (5th Cir. 1988); New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985); *in re* T.P. Long Chem., Inc., 45 Bankr. 278 (Bankr. N.D. Ohio 1985); *NEPACCO*, 579 F. Supp. 823 (W.D. Mo. 1984); *Price*, 577 F. Supp. 1103; *Wade II*, 577 F. Supp. 1326; United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983).

99. COMM. ON ENERGY AND COMMERCE, H.R. REP. NO. 253, pt. 1, 99th Cong., 1st Sess. 74

2. *Joint and Several Liability*

PRPs are jointly and severally liable under CERCLA unless the harm from the hazardous substance release is reasonably divisible.[100] As with strict liability, language imposing joint and several liability was deleted from the final version of CERCLA.[101] However, Congress intended that joint and several liability remain an option to be applied by the courts when proper. In *United States v. Chem-Dyne Corp.* the court arrived at this conclusion based on several excerpts from the Congressional Record including the following statement by Senator Randolph:

> It is intended that issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law. An example is joint and several liability. Any reference to these terms has been deleted, and the liability of joint tortfeasors will be determined under common or previous statutory law.[102]

House discussion contained similar explanations.[103]

The *Chem-Dyne* court adopted a uniform rule of federal common law fashioned after the Restatement (Second) of Torts sections 433A, 433B, 875, and 881.[104] Congress later confirmed the *Chem-Dyne* analysis as correct in SARA's legislative history.[105] Although the *Chem-Dyne* rule allows courts to apportion liability if the harm is divisible,

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(1985), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, 2856 (hereinafter *SARA History*; page references are to U.S. Code Cong. & Admin. News).

100. *Monsanto*, 858 F.2d at 171; *Shore Realty*, 759 F.2d at 1042 n.13; *Chem-Dyne*, 572 F. Supp at 806-07.

101. See cases cited *supra* note 100.

102. 572 F. Supp. 802, 807 (S.D. Ohio 1983) (quoting 126 Cong. Rec. S14,964 (daily ed. Nov. 24, 1980)).

103. *Id.*

104. *Chem-Dyne*, 572 F. Supp. at 810. Section 433A of the RESTATEMENT (SECOND) OF TORTS (1965) provides:

> (1) Damages for harm are to be apportioned among two or more causes where (a) there are distinct harms, or (b) there is a reasonable basis for determining the contribution of each cause to a single harm.
>
> (2) Damages for any other harm cannot be apportioned among two or more causes.

Section 433B provides:

> Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.

105. "[N]othing in this bill is intended to change the application of the uniform federal rule of joint and several liability enunciated by the *Chem-Dyne* court." *SARA History*, *supra* note 99, at 2856.

this seems a practical impossibility in most hazardous waste situations.[106] Furthermore, the proponent bears the burden of proving a reasonable basis for apportioning liability.[107]

3. *Retroactive Application*

It seems manifestly clear that CERCLA was intended to have retroactive application due to its central purpose of cleaning up abandoned and inactive hazardous waste sites.[108] Several courts have concluded that CERCLA's liability provisions apply retroactively to pre-CERCLA activities.[109] CERCLA's retroactive provisions do not violate due process.[110] Nor does CERCLA's liability scheme create an *ex post facto* law or bill of attainder.[111]

4. *The Causation Element*

One of the most deeply rooted traditional elements of tort culpability is that of "but-for" causation.[112] Nevertheless, courts have refused to require this element in imposing liability under CERCLA section 107.[113] This conclusion is based on Congress' substitution of the existing language in section 107 for prior language which imposed liability on "any person who *caused or contributed to* a release."[114] In response to a causation argument by owner-defendants, the court in *United States v. Monsanto Co.* stated: "The traditional elements of tort culpability on which the site-owners rely simply are absent from the statute. The plain language of section 107(a)(2) extends liability to owners of waste facilities regardless of their degree of participation in the subsequent disposal of hazardous waste."[115]

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106. *See Monsanto*, 858 F.2d at 171-73.

107. *Id.*

108. One of the "regulatory gaps" of RCRA (which CERCLA was intended to fill) is RCRA's primarily prospective application. *CERCLA History*, *supra* note 64, at 6125.

109. *Monsanto*, 858 F.2d at 174; *NEPACCO*, 810 F.2d at 732-34; United States v. Hooker Chems. & Plastics Corp., 680 F. Supp. 546 (W.D.N.Y. 1988); United States v. Shell Oil Co., 605 F. Supp. 1064, 1069-73 (D. Colo. 1985).

110. *Monsanto*, 858 F.2d at 174 (due process is satisfied by showing retroactive application of the statute is justified by a rational legislative purpose).

111. *Id.*

112. W. PROSSER & P. KEETON, TORTS § 41 (1984).

113. *E.g.*, *Monsanto*, 858 F.2d at 168; *Wade II*, 577 F. Supp. at 1333-34.

114. *Wade II*, 577 F. Supp. at 1333 (quoting H.R. 7020, 96th Cong., 2d Sess., § 3071(a)(1), 126 CONG. REC. at H9,459 (daily ed. Sept. 23, 1980)) (emphasis added); *accord Price*, 577 F. Supp. at 1114 n.11.

115. 858 F.2d at 168.

The combination of strict, joint and several, and retroactive liability, and the elimination of the traditional causation element, arguably make CERCLA liability the most radical tort liability scheme ever developed.[116] Liability of parties described in section 107 is just short of absolute, subject only to very narrow exceptions.[117] Congressional opponents of the Superfund Act labeled it unfair and described it as a hybrid tort-welfare system.[118] Courts, likewise, have recognized the inherent unfairness of CERCLA in some applications.[119]

Thus, considering CERCLA's liability structure, one should avoid the natural tendency to analyze its application in terms of "fairness." CERCLA just isn't fair. It isn't fair for past nonnegligent offsite generators to be liable for cleaning up a landfill—but they are.[120] It isn't fair for a site-owner to be liable even though he didn't contribute to the presence of, or cause the release of, hazardous substances at his facility—but he is.[121] Right or wrong, Congress created such a liability structure to address the massive problem of hazardous waste contamination.[122]

This new breed of environmental regulation is a radical departure from the familiar model of permits, effluent limitations, and ambient standards to which industry has become accustomed.[123] While the "polluter pays" principle is deeply ingrained in both types of control, the

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116. *See* Note, *Developments in the Law—Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1465 (1986).

117. See *supra* notes 88-93 and accompanying text.

118. Moreover, the liability provisions of H.R. 7020 are not based on sound causation principles. Common law tort theories provide a carefully structured system for use in determining causation. This system, the product of centuries of efforts to devise a fair and equitable formula, should not be lightly overturned in favor of loose causation principles. . . . Welfare is the relief which society provides to parties who are in need, or who have been injured and have no other source of relief. Tort law, however, is a system which provides relief to injured parties by means of assigning responsibility and accountability to some other individual or institution in society. . . . H.R. 7020 blurs the distinction between a welfare system and a tort law system.

*CERCLA History*, *supra* note 64, at 6144 (views of Representatives Broyhill, Devine, Collins, Loeffler, and Stockman).

119. "Though strict liability may impose harsh results on certain defendants, it is the most equitable solution in view of the alternative—forcing those who bear no responsibility for causing the damage, the taxpayers, to shoulder the full cost of the clean up." *Price*, 577 F. Supp. at 1114.

120. *Price*, 577 F. Supp. at 1103.

121. *Shore Realty*, 759 F.2d at 1043-44.

122. This is not to say, of course, that the structure cannot be changed. The point is that an analysis under the current statute should be cognizant of its inherent unfairness, rather than search in vain for equitable principles which do not exist.

123. Under the Clean Air Act and Clean Water Act, for example.

old model is much more predictable in terms of costs. Prospective pollution control requires the existing regulated community to conform to cognizable standards, the costs of which may be budgeted and systematically spread to consumers.

## IV. LENDER LIABILITY UNDER CERCLA

Under CERCLA, an "owner or operator"[124] of a hazardous waste "facility"[125] is potentially liable[126] for response costs at that facility. The statutory definition of "owner or operator" provides little help in understanding its precise application. Stripped of its exceptions and descriptions of vessels and facilities, the "definition" states only that an "owner or operator" is a person "owning or operating" a vessel or facility.[127]

The so-called "secured creditor exemption" excludes from the scope of "owner or operator" any "person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility."[128]

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124. CERCLA, 42 U.S.C. § 9601(20)(A).

125. CERCLA, 42 U.S.C. § 9601(9).

126. CERCLA, 42 U.S.C. § 9607(a).

127. CERCLA, 42 U.S.C. § 9601(20)(A). In United States v. Mirabile, the court noted: "Were it not for the underscored exemption from liability, the definition would be a hopeless tautology." 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994, 20,995 (E.D. Pa. 1985).

This is one area in which CERCLA's poor drafting and lack of reliable history is particularly evident. Courts have taken divergent approaches to divining Congress' intended meaning of "owner or operator." The court in *T.P. Long* simply stated that the definition was "not very helpful" and held that a debtor's estate was an "owner" with little discussion. 45 Bankr. at 283-84 (noting broad construction of CERCLA's liability provisions by other courts). In contrast, the *Maryland Bank & Trust* court quoted extensively from the legislative history in considering the terms. 632 F. Supp. at 577-80. However, the quoted excerpts accompanied earlier versions of the bill which underwent many changes before CERCLA was enacted. *See* Grad, *supra* note 81. As the court in *Shore Realty* explained:

> The compromise contains many provisions closely resembling those from earlier versions of the legislation, and the House and Senate sponsors sought to articulate the differences between the compromise and earlier versions. One of the sponsors claimed that the version passed 'embodie[d] those features of the Senate and House bills where there has been positive consensus' while 'eliminat[ing] those provisions which were controversial.'

759 F.2d at 1040 (citations omitted). Thus, portions of the ultimate bill which retained some and rejected other former provisions, are subject to diametrically opposed interpretations: (1) that some of the provisions were deleted due to controversy, and thus, the former explanation is inapposite; and (2) that the retention of some or most of the former provisions indicates substantial agreement on the prior meaning. Indeed, the court in *T.P. Long* noted that *both* parties "cited and relied upon" the same definition in the legislative history. 632 F. Supp. at 578 n.3.

128. CERCLA, 42 U.S.C. § 9601(20)(A). In SARA, Congress amended the definition of

Nowhere does the Superfund Act or its history attempt to explain the meaning of "participating in the management."[129] The most that safely can be stated is that Congress intended to afford *some* protection to secured creditors.

Some precursors to the final House version of CERCLA contained language similar to the secured creditor exemption. One early version read: " 'owner' . . . does not include a person who, without participation in the *management or operation* of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility."[130]

However, several factors counsel against putting much, if any, stock in this superseded provision or its associated commentary. First, the above-quoted version referred to "management *or operation.*" This could indicate that the drafters considered the terms to have different meanings; and therefore, management participation is not consistent with operator status.[131] Alternatively, the drafters merely may have deleted what was thought to be a superfluous term.[132] Furthermore, the Senate version of CERCLA initially lacked a secured creditor exemption.[133] So, even if the meaning of the initial House version was known, it is not a reliable indication of Congress' intent in passing its last minute compromise. The judicial decisions applying the secured creditor exemption illustrate the problems created by the cryptic provision.

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"owner or operator" to further exclude any "unit of State or local government" obtaining title or control of a facility by "bankruptcy, foreclosure, tax delinquency, abandonment, or similar means." Conspicuously absent from the new exclusion are the federal government and private lenders.

129. Tom, *Interpreting the Meaning of Lender Management Participation Under Section 101(20)(A) of CERCLA*, 98 YALE L.J. 925, 927 (1989). Tom reasons that "the minimum that could be meant by 'participating in the management,' " is involvement otherwise sufficient to impose operator liability on a party. *Id.* at 927 n.17, 936. *See also* Lender Liability Hearing, *supra* note 20, (statement of James P. O'Brien) (arguing that 'participation in the management' requires the same level of control necessary to be deemed an 'operator').

130. *Maryland Bank & Trust*, 632 F. Supp. at 579 (quoting the first draft of the Comprehensive Oil Pollution Liability and Compensation Act, H.R. 85, introduced May 15, 1979) (emphasis added).

131. *But see supra* note 129.

132. Which could lead to the conclusion that previous discussions of the superseded sections would be applicable to the provision as enacted. See *supra* notes 127.

133. *Fleet Factors*, 901 F.2d at 1558 n.11.

A. Judicial Interpretation of the Secured Creditor Exemption

1. *In re T.P. Long Chemical, Inc.*

In *In re T.P. Long Chemical, Inc.*[134] the court focused on whether the secured creditor, BancOhio National Bank, acted "primarily to protect its security interest." In that case, BancOhio held a perfected security interest in the bankrupt debtor's "accounts receivable, equipment, fixtures, inventory, and other personal property."[135] BancOhio had no interest in the real property, which the debtor had operated as a rubber recycling plant.[136] The bankruptcy trustee auctioned off all of the debtor's personal property except ninety drums of hazardous waste which had been secretly buried on the site.[137]

Following a release from the buried drums, EPA conducted a response action and sought reimbursement from funds held by the trustee and subject to BancOhio's security interest.[138] The bankruptcy court held that BancOhio could not be held liable for cleanup costs because: "The only possible indicia of ownership that can be attributed to BancOhio is that which is primarily to protect its security interest."[139] It was undisputed that BancOhio had not participated in the management of the facility.[140] In dictum, the court added that "even if BancOhio had repossessed its collateral pursuant to its security agreement it would not be an 'owner or operator' as defined under CERCLA."[141]

2. *United States v. Mirabile*

In *United States v. Mirabile*[142] the court squarely addressed the meaning of management participation under the secured creditor exemption for the first time. *Mirabile* involved motions for summary judgment by three secured lenders, American Bank & Trust Co.

134. 45 Bankr. 278 (Bankr. N.D. Ohio 1985).
135. *Id.* at 280.
136. *Id.*
137. *Id.* at 281.
138. *Id.* at 287.
139. *Id.* at 289.
140. *Id.*
141. *Id.* at 288. The court viewed foreclosure as an act "primarily to protect the security interest" of the secured creditor. This fact, the court implied, was the end of the inquiry unless the lender also participated in management of the facility (an issue absent from this case). *See* Comment, *Liability of Financial Institutions*, *supra* note 34, at 164.
142. 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994 (E.D. Pa. 1985).

(AB&T), Mellon Bank (East) National Association (Mellon), and the Small Business Administration (SBA).[143] The case arose after EPA cleaned up a contaminated site (Turco site)[144] and sued the Mirabiles, current owners, for reimbursement.[145] The Mirabiles in turn joined AB&T and Mellon as third party defendants, and the banks counterclaimed against the United States based on SBA's involvement.[146]

The court in *Mirabile* framed the issue of protection under the secured creditor exemption as follows:

> [T]he exemption plainly suggests that provided a secured creditor does not become *overly entangled* in the affairs of the actual owner or operator of a facility, the creditor may not be held liable for cleanup costs. The difficulty arises, of course, in determining how far a secured creditor may go in protecting its financial interests before it can be said to have acted as an owner or operator.[147]

After considering the legislative history, the court concluded that "Congress intended to draw a distinction between parties involved in the actual operation of the facility and those who are involved in what may properly be characterized as the financial aspects of the business conducted at the facility."[148] The court in *Mirabile* developed the following standard for determining when a lender becomes "overly entangled" to a degree which precludes application of the secured creditor exemption: "[B]efore a secured creditor . . . may be held liable, it must, at a minimum, participate in the day-to-day operational aspects of the site."[149]

In ruling on AB&T's motion for summary judgment, the *Mirabile* court considered the following facts. AB&T foreclosed on the real

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143. *Id.* at 20,994-95.

144. Turco Coatings, Inc. had used the site as a paint manufacturing facility. EPA removed about 550 drums of hazardous wastes at a cost of nearly $250,000. United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,992, 20,993 (E.D. Pa. 1985) (related proceeding to principal opinion discussed here).

145. *Id.* at 20,995. Other parties were involved which are not important for this discussion. For a more complete analysis, see Note, *supra* note 34, at 1275-80; Comment, *Liability of Financial Institutions*, *supra* note 34, at 165-70.

146. *Mirabile*, 15 Envtl. L. Rep. (Envtl. L. Inst.) at 20,995.

147. *Id.* (emphasis added).

148. *Id.* at 20,995-96. The court noted that the polluter pays principle underlying CERCLA "simply does not apply with the same force to secured creditors as it does" to persons more directly involved with waste disposal. *Id.* at 20,995.

149. *Id.* at 20,996. The opinion also referred to the "nuts-and-bolts, day-to-day production aspects of the business." *Id.* at 20,995.

property and was high bidder at the sheriff's sale.[150] AB&T then assigned its high bid to the Mirabiles without ever receiving the deed.[151] Earlier, AB&T took steps to protect the property against vandalism, inquired into waste disposal costs, and showed the property to prospective purchasers.[152] The court reasoned that foreclosure and passage of title were unimportant because AB&T had merely acted to protect its security interest in the property.[153] The court concluded that AB&T's involvement with the Turco site was limited to participation in *financial* decisions.[154] Therefore, the court granted AB&T's motion for summary judgment.[155]

In *Mirabile* the SBA also prevailed based on the secured creditor exemption.[156] Although SBA had some apparent authority to participate in Turco's management,[157] the authority was never exercised.[158] The court reiterated: "[P]articipation in *purely financial aspects* of operation, of the sort which occurred here, is [in]sufficient to bring a lender within the scope of CERCLA liability."[159]

Mellon's situation, however, presented a "cloudier situation."[160] Two loan officers of Mellon's predecessor were involved in the troubled manufacturer's business—one served on an advisory board (essentially financial), and another had some degree of involvement in the production and management aspects of the business.[161] It was this latter involvement which gave the court "pause," and raised an issue of fact for trial.[162]

### 3. *United States v. Maryland Bank & Trust Co.*

In *United States v. Maryland Bank & Trust Co.*[163] the court held that a lender lost secured creditor protection by foreclosing on and tak-

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150. *Id.* at 20,996.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.* at 20,995.
155. *Id.*
156. *Id.* at 20,996-97.
157. By virtue of its loan contract with Turco. *Id.* at 20,997.
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.* But the court stated that the basis of the claim against Mellon was a "slender reed indeed." *Id.*
163. 632 F. Supp. 573 (D. Md. 1986).

ing title to contaminated property. In support, the court reasoned that the bank's security interest "terminated at the foreclosure sale . . . at which time it ripened into full title."[164]

Public policy arguments are prominent in the court's opinion. First, allowing lenders to foreclose without liability "would convert CERCLA into an insurance scheme for financial institutions, protecting them against possible losses due to the security of loans with polluted properties."[165] Second, the court stated that lenders could "protect themselves by making prudent loans."[166] Finally, the court opined that lenders are in a good position to police the environmental problems of their debtors.[167] In *Mirabile* the court also recognized these policy issues, but believed Congress had not chosen to impose such liability on lenders.[168] Therefore, the courts should not do so.[169]

### 4. *Guidice v. BFG Electroplating & Manufacturing Co.*

The district court in *Guidice v. BFG Electroplating & Manufacturing Co.*[170] considered both lender management participation and the owner liability of a foreclosing lender. In *Guidice* the National Bank of the Commonwealth (Bank) held a mortgage on contaminated property which had been operated by Berlin Metal Polishers (Berlin).[171] After Berlin defaulted on its loan and prior to foreclosure, the Bank was involved with the debtor as follows: (1) Bank inquired into Berlin's accounts, personnel changes, and the presence of raw materials at the facility; (2) Bank actively assisted Berlin in applying for SBA financing; (3) Bank contacted the state environmental agency and assisted Berlin with wastewater discharge compliance; (4) a Bank agent inspected the property and reported to the Bank; and (5) Bank referred a

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164. *Id.* at 579.

165. *Id.* at 580.

166. *Id.*

167. *Id.*

168. Obviously, imposition of liability on secured creditors or lending institutions would enhance the government's chances of recovering its cleanup costs, given the fact that owners and operators of hazardous waste dumpsites are often elusive, defunct, or otherwise judgment proof. It may well be that the imposition of such liability would help to ensure more responsible management of such sites. The consideration of such policy matters, and the decision as to the imposition of such liability, however, lies with Congress.

*Mirabile*, 15 Envtl. L. Rep. (Envtl. L. Inst.) at 20,997.

169. *Id.*

170. 732 F. Supp. 556 (W.D. Pa. 1989).

171. *Id.* at 557-58.

potential lessee of the site to Berlin.[172] The *Guidice* court cited the holding in *Mirabile* and the district court decision in *Fleet Factors*, and held that "these activities prior to foreclosure [are] insufficient to void the security interest exemption of CERCLA."[173] The court reasoned that a secured lender must *control* the "operational, production, or waste disposal activities" of the debtor to be deemed participating in the management of the facility.[174]

The court in *Guidice* also articulated policy reasons for upholding the Bank's exemption in this situation:

> To encourage banks to monitor a debtor's use of security property, a high liability threshold will enhance the dual purposes of protection of the banks' investments and promoting CERCLA's policy goals. Conversely, a low liability standard would encourage a lender to terminate its association with a financially troubled debtor and expedite loan payments in an effort to recover the debts.[175]

Eventually, the Bank foreclosed on the Berlin facility and purchased the property at the foreclosure sale.[176] In considering the Bank's liability after foreclosure, the *Guidice* court essentially adopted the *Maryland Bank & Trust* rationale. The court held that a mortgagee which purchases mortgaged property at a foreclosure sale becomes an "owner" under CERCLA section 101(20)(A).[177] Significantly, the *Guidice* court found further support for its holding in SARA. SARA amended the definition of "owner or operator" to exclude any "State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment," or other involuntary means.[178] Congress did not simultaneously exclude private lenders acquiring property through foreclosure. This fact, the *Guidice* court reasoned, evidenced Congress' intent that foreclosing lenders be liable as owners.[179]

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172. *Id.* at 562.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 559.

177. *Id.* at 563.

178. CERCLA, 42 U.S.C. § 9601(20)(D).

179. 732 F. Supp. at 563; see *infra* notes 283-87 and accompanying text.

## B. Judicially Created Liability—"The Capacity to Influence"

### 1. *United States v. Fleet Factors Corp.*

*United States v. Fleet Factors Corp.*[180] is the first appellate decision interpreting the scope of the secured creditor exemption.[181] The Eleventh Circuit narrowly construed the secured creditor exemption and held that a lender may lose the statutory protection by becoming too involved in the financial management of the borrower's business.[182]

In 1976, Fleet Factors Corporation (Fleet) entered into a factoring agreement with Swainsboro Print Works (SPW), a textile printing company. Under the financing arrangement, Fleet advanced operating funds to SPW in exchange for an assignment of SPW's accounts receivable. Fleet also received a security interest in all of SPW's inventory, fixtures, and equipment, and a "deed to secure debt"[183] on SPW's real property.

SPW filed a chapter 11 bankruptcy petition in August 1979. With bankruptcy court approval, Fleet continued to make secured advances to SPW as debtor-in-possession.[184] SPW halted production in early 1981 after Fleet ceased advancing funds for operation.[185] In December 1981, SPW was adjudicated a bankrupt under chapter 7 and the bankruptcy court appointed a trustee to supervise the liquidation of assets.

After SPW ceased operations in early 1981, Fleet became involved in winding down the debtor's affairs. The United States alleged that Fleet required SPW to get Fleet's approval before making shipments. Fleet also allegedly established inventory prices, determined shipment priorities, determined employee layoffs, supervised office administration, processed SPW's tax forms, and controlled plant access.[186]

With bankruptcy court approval, Fleet foreclosed on its security interest in SPW's inventory and equipment in May 1982. Fleet then

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180. 901 F.2d 1550 (11th Cir. 1990). The facts in this section are found at 901 F.2d 1552-53 unless otherwise indicated.

181. Decided May 23, 1990. *Id.* On January 14, 1991, the Supreme Court declined to consider the issues raised in *Fleet Factors*, Fleet Factors Corp. v. United States, No. 90-504 (U.S. Jan. 14, 1991). See 21 Env't Rep. (BNA) 1675 (Jan. 18, 1991).

182. *Id.*

183. Fleet's security interest in SPW's plant was evidenced by an instrument entitled "Deed with Power of Sale to Secure Debt." Brief of Appellant Fleet Factors Corp. at 5, United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990) (No. 89-8094) (hereinafter Fleet Brief).

184. *Fleet Factors*, 724 F. Supp. at 957 (S.D. Ga. 1988).

185. Fleet determined that SPW's debt to Fleet exceeded the estimated value of SPW's accounts receivable. 724 F. Supp. at 958.

186. 901 F.2d at 1559.

contracted with an auctioneer to sell the inventory and equipment. The auctioneer sold the collateral "as is" and "in place" in June 1982. Fleet did not bid at the auction. Further, Fleet never foreclosed on nor took legal title to the debtor's real property.

The United States alleged that, following the auction, Fleet engaged Nix Riggers (Nix) to remove remaining unsold equipment and leave the plant "broom clean."[187] Purchasers were to remove their own equipment. Sometime during the auction and equipment removal activities, hazardous substances were released at the site. The United States asserted that the auctioneer moved drums of toxic chemicals, causing a release. The government further alleged that Nix and the equipment buyers knocked friable asbestos loose during equipment removal activities.

In 1984, EPA conducted a two-phase cleanup of the SPW facility. First, EPA removed 700 drums of hazardous chemicals.[188] Second, EPA removed forty-four truckloads of asbestos-containing material. In both phases, EPA incurred response costs of about $375,000.[189] In 1987, the United States filed this cost recovery action under CERCLA.

The Eleventh Circuit analyzed Fleet's involvement with SPW during three different time periods: (1) 1976 to early 1981, when Fleet supplied funds for SPW's ongoing activities; (2) early 1981 until June 1982, after SPW ceased production and before Fleet foreclosed on its security interest, during which Fleet was involved in winding down SPW's affairs; and (3) June 1982 to December 1983, from Fleet's foreclosure until Nix Riggers left the facility.[190]

The Eleventh Circuit held that Fleet's activities during either the second or third periods, if proven, were sufficient to incur CERCLA liability. In so holding, the court articulated a new standard for determining lender liability under CERCLA:

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187. 724 F. Supp. at 958.

188. On January 20, 1984, federal EPA and Georgia EPD officials conducted a preliminary site investigation and found that the Swainsboro site contained 700 damaged drums of flammable and nonflammable wastes (paint pigments, dyes, and solvents) caustic soda and silicate of soda. Several vats and a drum of sodium cyanide were also found.

Brief for the United States as Appellee at 16, United States v. Fleet Factors Corp., 724 F. Supp. 955 (11th Cir. 1990) (No. 89-8094) (hereinafter U.S. Brief).

189. U.S. Brief, *supra* note 188, at 17.

190. 901 F.2d at 1559-60; *see also* Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit at 4, U.S. Supreme Court (October Term 1990) (filed September 22, 1990, by Petitioner, Fleet Factors Corp.) (copy supplied by King & Spalding, Washington D.C., one of Petitioner's attorneys) (hereinafter Fleet Petition for Cert.).

> [A] secured creditor may incur section 9607(a)(2) liability, without being an operator, by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes. It is not necessary for the secured creditor actually to involve itself in the day-to-day operations of the facility in order to be liable—although such conduct will certainly lead to the loss of the protection of the statutory exemption.[191]

The court in *Fleet Factors* adopted the United States' questionable framing of the liability issue. The government contended that Fleet could be liable *either* as an "operator" *or* by holding an indicia of ownership and managing the facility "to the extent necessary to remove it from the secured creditor exception."[192] The court chose to "forgo an analysis of Fleet's liability as an operator," and proceeded under the government's second theory.[193] Thus, the Eleventh Circuit appears to have fashioned a new basis for liability. Under the Eleventh Circuit's approach, a lender with quasi-owner status (by virtue of holding indicia of ownership) coupled with quasi-operator involvement (participating in financial management) can be liable as a hybrid owner-operator. This approach is based, not on the *liability* provisions of CERCLA section 107(a),[194] but on an *exception to the definition* of "owner or operator" in section 101(20)(A).[195]

### 2. *In re Bergsoe Metal Corp.*

A few months after the Eleventh Circuit's *Fleet Factors* decision, the Ninth Circuit had occasion to consider the scope of the secured creditor exemption in *In re Bergsoe Metal Corp.*[196] The court in *Bergsoe* affirmed summary judgment in favor of the defendant, Port of St. Helens, an Oregon municipal corporation.[197]

In *Bergsoe* the Port of St. Helens (Port) issued industrial development revenue bonds to finance construction of a lead recycling plant.[198] The United States National Bank of Oregon (Bank) became the trus-

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191. 901 F.2d at 1557-58.

192. *Id.* at 1556 n.6. For the origin of this construction, see U.S. Brief, *supra* note 188, at 36 (statement of issue III).

193. 901 F.2d at 1556 n.6.

194. CERCLA, 42 U.S.C. § 9607(a).

195. CERCLA, 42 U.S.C. § 9601(20)(A).

196. No. 89-35397, slip op. 8627 (9th Cir. Aug. 9, 1990).

197. *Id.* at 8628.

198. *Id.* at 8631.

tee for the bondholders and also purchased the bonds.[199] Initially, the Port and Bergsoe executed a sale-and-lease-back agreement, whereby the Port received a deed to the real estate and Bergsoe made lease payments matching the bond repayment schedule.[200] The Port subsequently mortgaged the realty to the Bank and assigned all rights under the lease to the Bank.[201] Bergsoe was then obligated to pay all relevant payments directly to the Bank.[202] In short, the Port served merely as a conduit for bond issuance and had no further involvement in the project.

When Bergsoe defaulted on the leases, the Bank and Bergsoe agreed on a workout plan and hired a management corporation to manage the facility.[203] The Port signed off on various workout documents.[204] Ultimately, the Bank and the bankruptcy trustee filed suit against the owners of Bergsoe to recover the debt and obtain a declaration of liability for cleaning up contamination which had been discovered in the interim.[205] The defendants filed a third party complaint against the Port for cleanup costs under CERCLA.[206]

The Ninth Circuit found that the Port held only a security interest to ensure Bergsoe's payment on the leases and bonds. Therefore, the Port came within the scope of the security interest exemption.[207] The court further held that the Port had not participated in the management of the Bergsoe facility.[208] However, the court declined to establish a Ninth Circuit standard for "participation in management." The court stated: "It is clear from the statute that, whatever the precise parameters of 'participation,' there must be *some* actual management of the facility before a secured creditor will fall outside the exception. Here there was none, and we therefore need not engage in line drawing."[209]

There is disagreement over whether the *Bergsoe* decision conflicts with the *Fleet Factors* holding. In a footnote the *Bergsoe* court stated: "Merely having the power to get involved in management, but failing

199. *Id.* at 8632.
200. *Id.* at 8631-32.
201. *Id.*
202. *Id.*
203. *Id.* at 8632.
204. *Id.*
205. *Id.* at 8633.
206. *Id.*
207. *Id.* at 8634.
208. *Id.*
209. *Id.* at 8636.

to exercise it, is not enough" to lose secured creditor protection.[210] Some observers argue that this conflicts with the "capacity to influence" language of the *Fleet* standard.[211] However, in *Fleet Factors* it was undisputed that the lender exercised extensive *financial* management of the debtor's affairs.[212] In contrast, the court in *Bergsoe* explicitly found that the Port exercised *no* actual management of the facility (financial or otherwise).[213] On its face then, the Ninth Circuit's decision does not appear to conflict with the *Fleet* standard.[214]

C. Statutory Construction of the Secured Creditor Exemption

The interpretation of the secured creditor exemption by the Eleventh Circuit in *Fleet Factors* is difficult to reconcile with established rules of statutory construction. A statutory *exception*, by definition, defines a specific situation in which the general rule does not apply.[215] The secured creditor exemption is an exception to the *definition* of "owner or operator."[216] If a party meets the criteria of the exception, then it does not fall within the scope of the general definition. But, the converse is not necessarily true. That is, not every party which fails to satisfy the exception falls within the general definition. For example, a transporter does not become an "owner or operator" just because it is not a secured creditor.

Furthermore, the definition in CERCLA section 101(20)(A) does not independently impose liability. Liability is imposed by section 107(a), which clearly applies only to "owners or operators." Therefore, regardless of the route taken, a court must arrive at the conclusion that a party is either an "owner" or an "operator" to impose liability under section 107(a). Nevertheless, the Eleventh Circuit in *Fleet Factors* concluded that CERCLA "explicitly holds secured creditors liable if they participate in the management of a facility."[217] There is no such language in section 107, the provision which creates liability.[218]

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210. *Id.* at 8638 n.3.

211. IV Superfund Rep. (Inside EPA) No. 18, at 3 (Aug. 29, 1990).

212. See *supra* notes 184-87 and accompanying text.

213. *Bergsoe*, slip op. at 8636.

214. Nevertheless, attorneys for Fleet Factors Corp. described the *Bergsoe* opinion as being "in tension" with *Fleet*. Fleet Petition for Cert., *supra* note 190, at 6.

215. 2A N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.11 (4th ed. 1984).

216. CERCLA, 42 U.S.C. § 9601(20)(A).

217. 901 F.2d at 1557.

218. Apparently, the court in *Fleet Factors* somehow found a liability provision written in invisible ink outside of CERCLA section 107. The court stated: "[T]he phrase 'participating in

It stands to reason that the secured creditor exemption was intended to clarify (however ineffective the attempt may have been) that a secured creditor is not to be considered an "owner" merely by holding a security interest in contaminated property. This is a logical "clarification" considering the different common law theories of mortgage ownership.[219] However, Congress did not intend for a secured creditor which actually operates a facility to escape liability. So Congress added a qualification to the secured creditor exception for a party which participates in the management of the facility. Without this limitation on the exemption, an operator could have avoided liability by taking a security interest in the facility. This common sense approach seems preferable to a tortured analysis of the ambiguous and contradictory legislative history of the provision.[220]

Finally, the "extremely liberal" construction given statutes enacted to protect public health[221] should not apply equally to an *exception*. There is little doubt that CERCLA should be broadly interpreted to achieve its "overwhelmingly remedial" purpose.[222] But, when Congress wrote an exception into the liability structure, it made a policy decision that other considerations outweighed CERCLA's remedial purpose in that specific situation. The courts should not substitute their policy positions for those of Congress, even if they make good sense.[223]

## V. THE FUTURE OF LENDER LIABILITY UNDER CERCLA

The parameters of lender liability for Superfund cleanups is rapidly evolving. Early cases, such as *United States v. Mirabile*, confirming that lenders could be liable for the environmental misdeeds of bor-

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the management' and the term 'operator' are not congruent. Under the standard we adopt today, a secured creditor may incur section 9607(a)(2) liability, *without being an operator . . . .*" *Id.* at 1557 (emphasis added). Nowhere did the court find that Fleet was an owner.

In its petition for certiorari, Fleet states: "The Eleventh Circuit's interpretation of CERCLA turns the statute on its head by using the exemption to subject lenders to liability rather than to shield lenders from liability." Fleet Petition for Cert., *supra* note 190, at 8. The court in *Fleet Factors* apparently adopted this questionable theory of liability from the United States' framing of the issues in its brief. U.S. Brief, *supra* note 188, at 36 (statement of issue III).

219. Three theories of mortgage property interests exist in the United States today: title theory, lien theory, and intermediate theory. G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW § 4.1 (2d ed. 1985). In a title theory jurisdiction, the argument for finding a mortgagee an "owner" would be stronger.

220. See *supra* notes 128-33 and accompanying text.

221. 3A N. SINGER, *supra* note 219, § 71.02; *see* Note, *supra* note 34, at 1292.

222. See cases cited *supra* note 37 and accompanying text.

223. See *supra* notes 165-69 and accompanying text.

rowers, shocked the financial community.[224] But, under the *Mirabile* standard, a lender may lose secured creditor protection only by participating in the day-to-day operational aspects of the facility.[225] The *Mirabile* rationale is generally consistent with prevailing debtor-creditor principles.[226] The Eleventh Circuit's *Fleet Factors* decision goes far beyond the *Mirabile* standard and imposes liability on lenders with the "capacity to influence" hazardous waste disposal decisions of borrowers.[227]

## A. Legislative Proposals

The *Fleet Factors* case "galvanized the banking community into a major lobbying effort seeking congressional action to protect lenders from Superfund [liability]."[228] This lobbying effort resulted in several proposals in the 101st Congress to further protect lenders and related governmental entities.

The most prominent proposal, H.R. 4494,[229] was introduced by Representative John LaFalce (D-NY), Small Business Committee Chairman. The bill had two cosponsors and drew 245 supporters.[230] H.R. 4494 would exclude from CERCLA liability foreclosing lenders and fiduciaries which take title or control of contaminated trust or estate property. A companion bill, H.R. 4076,[231] would exempt federal bank-related entities. S. 2827,[232] introduced by Senator Jake Garn (R-Utah), contained similar exculpatory provisions which would amend the Federal Deposit Insurance Act.

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224. *See* Burcat, *supra* note 16.

225. *Mirabile*, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994, 20,996 (E.D. Pa. 1985).

226. Burcat, *supra* note 16, at 535.

227. *Fleet Factors*, 901 F.2d at 1557-58.

228. IV Superfund Rep. (Inside EPA) No. 20, at 4 (Sept. 26, 1990).

229. H.R. 4494, 101st Cong., 2d Sess. (1990) (To amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 to limit the liability under that Act of lending institutions acquiring facilities through foreclosure or similar means and corporate fiduciaries administering estates or trusts) (introduced Apr. 4, 1990).

230. As listed on the July 11, 1990 printing of the bill.

231. H.R. 4076, 101st Cong., 2d Sess. (1990) (To amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 to exempt a Federal department, agency, or instrumentality from liability under that Act when a facility is conveyed to the department, agency, or instrumentality due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means) (introduced Feb. 22, 1990).

232. S. 2827, 101st Cong., 2d Sess. (1990) (To improve the administration of the Federal Deposit Insurance Corporation and to make technical amendments to the Federal Deposit Insurance Act) (introduced June 28, 1990).

B. EPA's Proposed Interpretive Rule

In response to these legislative moves, EPA made a dramatic policy shift.[233] EPA had opposed previous efforts to increase lender protection.[234] But, on August 2, 1990, EPA stated that it now supports "a rule or legislation that defines a 'safe harbor' in which lenders could take responsible actions without incurring CERCLA liability."[235] However, EPA strongly favors "administrative clarification" (rather than legislation) for addressing the "legitimate concerns" of the financial community.[236] The United States Department of Justice supports EPA's rulemaking approach.[237] Environmentalists and chemical industry representatives side with EPA and oppose congressional change to CERCLA liability.[238]

Notwithstanding the congenial rhetoric, EPA's policy shift "of major proportions" does not represent a *philosophical* shift.[239] Instead, it is merely a "pragmatic response to a frontal attack on the CERCLA liability scheme."[240]

EPA Assistant Administrator for Enforcement, James Strock, stressed there should be three prerequisites to lender protection: (1) an obligation of due diligence investigations, (2) reasonable response upon discovering contamination on acquired property, and (3) if Superfund pays for a cleanup, EPA should be able to recoup its costs.[241] Of course, how these goals are to be achieved is the crucial question. Strock stated: "The goal of our efforts should be to interpret . . . (the 'secured creditor' exemption) to allow lenders to foreclose on property and to conduct loan workouts so they could protect their 'security inter-

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233. IV Superfund Rep. (Inside EPA), No. 17, at 3 (Aug. 15, 1990).

234. In 1989, an EPA administrator testified against an earlier version of legislation to protect lenders. On July 19, 1990, an EPA administrator declined to take a position on proposed legislation at a Senate Banking Committee hearing. *Id.*

235. Lender Liability Hearing, *supra* note 20 (statement of James Strock, Assistant Admin. for Enforcement, EPA).

236. *Id.* "Specifically, EPA will use its authority to promulgate a rule, which we would issue expeditiously, to preserve the CERCLA 'security interest exemption' and avoid the potentially inequitable treatment of both public and private lenders, as well as similarly situated federal agencies." *Id.*

237. IV Superfund Rep. (Inside EPA) No. 18, at 8 (Aug. 29, 1990).

238. See reports cited *supra* note 22.

239. Telephone interview with William H. Frank, Special Assistant to the Assistant Administrator for Enforcement, EPA, Washington, D.C. (Sept. 21, 1990).

240. *Id.*

241. Lender Liability Hearing, *supra* note 20 (statement of James Strock, Assistant Admin. for Enforcement, EPA).

est' without triggering CERCLA liability."[242]

Despite lingering issues, EPA seems generally tuned in to lenders' primary concerns.[243] EPA's proposed interpretive rule[244] recognizes a lender's need to manage loans and protect collateral value without incurring CERCLA liability. The proposal outlines five main factors concerning a lender's eligibility for exemption from Superfund liability.

### 1. *Making a Loan*[245]

When making a loan, a lender must act "primarily to protect a security interest."[246] To satisfy this criterion, a lender has an affirmative duty to undertake "an inspection or audit of the collateral."[247] This inquiry should serve the dual purposes of minimizing environmental liability and properly assessing the value of the collateral.[248] The proposed rule gives no guidance as to what constitutes an appropriate environmental assessment.

### 2. *Policing the Loan*[249]

EPA's proposal allows lenders to take steps to ensure environmental responsibility of the borrower without risking CERCLA liability. During the life of the loan, a lender may monitor the collateral or the

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242. Lender Liability Hearing, *supra* note 20 (statement of James Strock, Assistant Admin. for Enforcement, EPA).

243. One administrator expressed EPA's view as follows: "If a banker's going to act as a banker—then he shouldn't be liable. But if a banker's going to act as a hazardous waste management operator—he should be liable." Telephone interview with William H. Frank, Special Assistant to the Assistant Administrator for Enforcement, EPA, Washington, D.C. (Sept. 21, 1990). Mr. Frank pointed out that EPA has gone to great lengths to develop a rule which uses terms and concepts common to the banking industry. EPA has spent days in technical work sessions with lenders, attorneys, business representatives, and federal banking agencies, trying to define terms and conform regulatory concepts to the real world. *Id.*

244. When this manuscript was submitted, EPA's proposed rule was undergoing review in the Office of Management and Budget and was not yet public. A prepublication draft of the proposal was reprinted in 21 Env't Rep. (BNA) 1162 (Oct. 12, 1990).

245. *Id.* at 1164.

246. *Id.*

247. *Id.* The environmental assessment requirement is prospective only and does not apply to existing loans. *Id.* at 1167 n.3. The effect of affirmative requirements imposed by this *interpretive rule* is questionable. Interpretive rules merely explain or clarify existing law, and do not create new duties. *E.g.*, Standard Oil Co. v. FERC, 770 F.2d 779 (9th Cir. 1985). The thread connecting CERCLA's secured creditor exemption with an affirmative duty to conduct environmental assessments on proposed collateral is quite thin indeed.

248. 21 Env't Rep. (BNA) 1164.

249. *Id.*

debtor's business, require cleanup activities, demand assurance of compliance with environmental laws, or impose other reasonable conditions to police the loan.[250] Lenders may write such conditions into the loan agreement.[251] Furthermore, the rule explicitly states that "a lender is not expected to be an insurer or guarantor of environmental safety."[252]

3. *Loan Work Out*[253]

Under certain conditions, the proposed rule would allow lenders to "work out" a loan with a troubled borrower. To preserve secured creditor protection: (1) the lender must take such actions "in an effort to prevent default of the loan or diminution of the value of the collateral"; (2) the lender must "duly consider and account for the hazardous substances known to be present at the facility, and must not cause or contribute by act or omission to the environmental harm at issue"; and (3) "the borrower [must] remain[] the ultimate decision maker for operation at the facility."[254] Examples of permissible activities include restructuring the loan, assessing additional interest, extending the payment due date, and giving general advice (including operational advice).[255]

4. *Foreclosure and Liquidation*[256]

Foreclosure on the collateral or acquisition of title by foreclosure or similar proceedings will not subject the secured lender to CERCLA "owner" liability.[257] However, the acquisition of title must be only "temporary" and "reasonably necessary to ensure satisfaction or performance of the loan obligation."[258] If a lender holds title to the facility too long, the property may be considered an investment, which is beyond the scope of the secured creditor exemption.[259] A foreclosing

250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.*
259. For purposes of this rule, a lender holding property after foreclosure for six months or fewer is presumed to be holding to protect the security interest. However, if the lender has not divested itself of the property within this time, the burden shifts to the lender to demonstrate that it continues to hold the property primarily to protect the

lender also may undertake responsible actions to wind up debtor's operations and liquidate the collateral without incurring liability.[260] However, if the lender's actions "cause or contribute to environmental contamination" the lender may be charged with cleanup costs.[261]

### 5. *No Windfall to Lenders*

The proposed rule contemplates that lenders should not be allowed to profit from government cleanup of contaminated collateral.[262] If EPA cleans up property in which a lender holds indicia of ownership, and the lender profits from the property's increased value, EPA will seek reimbursement for the increased value attributable to cleanup.[263] EPA's mechanism for recovery in this instance is "equitable reimbursement, under applicable principles of law."[264] It is unclear what the "applicable principles of law" would be.[265]

## VI. ADMINISTRATIVE FIX OR LEGISLATIVE CHANGE?

Reactions to EPA's proposed interpretive regulation to clarify lender liability for Superfund cleanups are mixed.[266] Supporters of lender protection are pleased with EPA's *policy* reversal, but some argue that an "administrative fix" is inadequate for providing the needed relief.[267] James O'Brien, an attorney representing lenders,[268] asserts

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security interest, taking all relevant facts and circumstances into account. *Id.* at 1165.

260. *Id.*

261. *Id.*

262. *Id.*

263. The increase in value is equal to the amount the lender realized from the foreclosure sale, less the value of the property in its previously contaminated condition. *Id.*

264. *Id.*

265. The basis for cost recovery in this situation is particularly troublesome. It appears that EPA would attempt to apply common-law principles. However, CERCLA arguably forecloses application of common-law principles to cost recovery for Superfund cleanups. In 1986, SARA added subsection 9607(1) to CERCLA's liability provisions. That subsection provides for a federal lien to be imposed on all property cleaned up by Superfund. The provision explicitly states: "The lien imposed by this subsection shall be subject to the rights of any purchaser, *holder of a security interest*, or judgment lien creditor whose interest is perfected [before the federal lien attaches]." 42 U.S.C. § 9607(1) (emphasis added). This language seems to preclude any "equitable reimbursement" from a secured lender whose interest arose prior to cleanup.

266. VI Superfund Rep. (Inside EPA) No. 18, at 9 (Aug. 29, 1990); *Id.* No. 17, at 4 (Aug. 15, 1990).

267. O'Brien, *Environmental Lender Liability: Will an Administrative Fix Work?*, 5 Toxics L. Rep. (BNA) 512 (Sept. 12, 1990); IV Superfund Rep. No. 17, at 4 (Aug. 15, 1990). O'Brien's article was originally prepared at the request of the Subcomm. on Transp. & Hazardous Materi-

that at best, the courts will receive some guidance from an EPA regulation.[269] Thus, the rule will not provide certainty to lenders, and will not extend to private CERCLA actions against lenders.[270]

EPA disagrees, arguing that courts will afford "great deference" to EPA's interpretation of CERCLA.[271] In support of its position, EPA points to the Ninth Circuit decision in *Wickland Oil Terminals v. Asarco, Inc.*[272] In *Wickland* the court adopted EPA's interpretation that the National Contingency Plan did not require formal agency approval of a cleanup plan as a prerequisite to a private CERCLA cost recovery action.[273] However, the EPA interpretation in *Wickland* was an interpretation of EPA's own regulations, not of the CERCLA statute itself.[274]

The United States Supreme Court outlined the deference courts are to pay to agency *statutory* interpretations in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[275] The Court fashioned a two-step analysis in *Chevron* for reviewing an agency's interpretation of a statute it administers. First, the court must search for clear congressional intent on the issue.[276] "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[277] Second, if Congress has not directly addressed the issue, the court must give deference to the agency interpretation if it is based on a "permissible construction of the statute."[278]

There is no doubt that the secured creditor exemption in CERCLA section 101(20)(A) is ambiguous.[279] However, like the courts in

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als of the Comm. on Energy & Commerce (Thomas Luken, Chairman), following Mr. O'Brien's testimony at the Hearing on Lender Liability Under Superfund (Aug. 2, 1990). Telephone interview with James P. O'Brien, Chapman & Cutler, Chicago, Illinois (Sept. 21, 1990).

268. James P. O'Brien is an attorney in the Chicago, Illinois office of Chapman & Cutler. Mr. O'Brien served as editor and an author of ENVIRONMENTAL DUE DILIGENCE: THE COMPLETE RESOURCE GUIDE FOR REAL ESTATE LENDERS, BUYERS, SELLERS, AND ATTORNEYS (J. O'Brien & W. Frank, eds. 1989).

269. O'Brien, *supra* note 267.

270. *Id.*

271. IV Superfund Rep. (Inside EPA) No. 17, at 4 (Aug. 15, 1990).

272. 792 F.2d 887 (9th Cir. 1986).

273. *Id.*

274. *Id.* at 891.

275. 467 U.S. 837 (1984).

276. *Id.* at 842.

277. *Id.* at 842-43.

278. *Id.* at 843.

279. See *supra* notes 127-32 and accompanying text.

*United States v. Maryland Bank & Trust Co.*[280] and *Guidice v. BFG Electroplating & Manufacturing Co.*,[281] subsequent courts could find that Congress intended for a foreclosing lender to lose the exemption. In fact, the court in *Guidice* specifically found that "the failure of the 1986 [SARA] amendments to specifically exempt mortgagees-turned-landowners," was a persuasive indication of Congress' intent.[282]

The rationale employed by the *Guidice* court is embodied in the "doctrine of legislative reenactment."[283] In *Lorillard v. Pons*[284] the United States Supreme Court stated the doctrine as follows: "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."[285] In considering SARA and the issue of lender liability, the case is even stronger for finding congressional reenactment. Congress considered the definition of "owner or operator," and amended it to exclude state and local governments involuntarily acquiring ownership.[286] But Congress did not exclude foreclosing lenders. Thus, a very real possibility exists that some courts would find congressional intent contrary to EPA's proposed interpretive rule. If a court finds that SARA evinces congressional intent to hold foreclosing lenders liable as owners, "that is the end of the matter."[287]

## VII. CONCLUSION

CERCLA may well be the most radical liability scheme ever developed in the United States. It was designed to address an environmental problem of massive proportions—cleaning up contaminated inactive and abandoned hazardous waste sites. CERCLA's structure is inherently unfair in some applications. This reflects Congress' policy decision that CERCLA's overwhelmingly remedial goals outweigh the cost CERCLA imposes on businesses responsible for environmental problems. However, as the court in *Mirabile* observed, the polluter pays principle "simply does not apply with the same force to secured

280. 632 F. Supp. 573 (D. Md. 1986).

281. 732 F. Supp. 556 (W.D. Pa. 1989).

282. *Id.* at 563.

283. The "doctrine of legislative reenactment" is not specifically referred to by the court in *Guidice*. For discussions of the doctrine, see Isaacs v. Bowen, 865 F.2d 468, 473 (2d Cir. 1989); and 2A C. SANDS, SUTHERLAND ON STATUTORY CONSTRUCTION § 49.09 (4th ed. 1973).

284. 434 U.S. 575 (1978).

285. *Id.* at 580.

286. CERCLA, 42 U.S.C. § 9601(20)(D).

287. *Chevron*, 467 U.S. 837, 842 (1984).

creditors" as it does to persons more directly involved with hazardous waste activities.[288] Congress explicitly recognized this problem in drafting the secured creditor exemption.

Even without the risk of CERCLA liability, lenders have a strong incentive to investigate a borrower's environmental practices and the environmental history of proposed collateral. Obviously, the lender wants to realize the anticipated return on the loan. If hazardous waste problems develop on the collateral, it will seriously impair debtor's ability to repay the loan and may well render the collateral worthless.

In *Fleet Factors* the Eleventh Circuit reasoned that imposing liability on financial institutions will encourage them to become "environmental policemen."[289] Undoubtedly, lender liability under CERCLA will increase pretransaction environmental investigations. Lenders, however, are unlikely to actively monitor debtors during the life of the loan, for fear of incurring quasi-owner/quasi-operator liability as fashioned by the court in *Fleet Factors*. Furthermore, lenders will avoid becoming involved in workouts involving cleanups or other response activities. To encourage secured creditors to monitor borrowers' activities, creditors should be afforded *protection* for becoming involved, not liability.[290] As stated above, lenders already have a compelling motive to investigate environmental issues of a potential debtor.

Finally, either EPA or Congress will be changing the standard of Superfund lender liability in the near future. *Should* this type of change in the statutory structure be accomplished administratively? The answer is a resounding *no*. The question of lender liability under CERCLA is purely a policy decision. Superfund's broad remedial goals must be balanced against the impact on the financial community, which is only remotely connected to actual waste disposal. In short, how far does the "polluter pays" principle extend?

Society has affirmed that environmental values transcend tradi-

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288. *Mirabile*, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994, 20,995.

289. Our ruling today should encourage potential creditors to investigate thoroughly the waste treatment systems and policies of potential debtors. . . . Similarly, creditors' awareness that they are potentially liable under CERCLA will encourage them to monitor the hazardous waste treatment systems and policies of their debtors and insist upon compliance with acceptable treatment standards as a prerequisite to continued and future financial support.

*Fleet Factors*, 901 F.2d at 1558 (citations omitted).

290. *Guidice*, 732 F. Supp. 556, 562 (W.D. Pa. 1989); Lender Liability Hearing, *supra* note 20 (statement of James W. Nelson, on behalf of Mortgage Bankers Association of America). *But see id.* (statement of Donald S. Strait, Senior Project Attorney, Natural Resources Defense Council).

tional economic considerations of land use, at least in some situations. But this affirmation is far from complete. If the costs become too personal, society's eagerness for environmental regulation often diminishes.[291] Thus, the debate rages over whose economic interests are to be subordinated to the greater good of society and how such mechanisms should operate.

This policy decision does not call for "great expertise" of a technology-oriented agency "charged with the responsibility for administering the provision."[292] The only "technical" provisions involve financial matters within the lending industry. Surely, Congress is better equipped to make such policy decisions than is EPA.

The argument for congressional action is even stronger in this case because CERCLA provides EPA with no clear standard on which to base interpretation of the secured creditor exemption. In *United States v. Robel*[293] Justice Brennan wrote: "Formulation of policy is a legislature's primary responsibility, entrusted to it by the electorate, and to the extent Congress delegates authority under indefinite standards, this policy-making function is passed on to other agencies, often not answerable or responsive in the same degree to the people."[294] Congress should not "throw the mess into the lap of an administrative agency" merely to avoid making difficult decisions.[295]

Neither the courts nor the banking industry have ever been sure about what Congress intended by the secured creditor exemption. Congress has an opportunity to remedy that problem. Our representative assembly should not abdicate its decision-making responsibility by asking an administrative agency to articulate national policy.[296]

*G. Alan Perkins*

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291. Blake, *The Economic Impacts of Environmental Regulation*, NAT. RESOURCES & ENV'T, Summer 1990, at 23.

292. *Chevron*, 467 U.S. at 865.

293. 389 U.S. 258 (1967).

294. *Id.* at 276.

295. Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 585-86 (1972); *see also* Frohmayer, *Of Legislative Intent, the Perils of Legislative Abdication, and the Growth of Administrative and Judicial Power*, 22 WILLIAMETTE L. REV. 219 (1986).

296. This is particularly true with CERCLA because the agency has little to go on. The legislative history of CERCLA is shrouded in mystery. Thus, almost any interpretation will be difficult to refute. When Congress delegates authority to an agency, it should provide the agency with clear standards. Frohmayer, *supra* note 295, at 235-36.